84-1508

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

HARVIS CONSTRUCTION, INC., SEABOARD SURETY COMPANY, and THE HOME INSURANCE COMPANY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
For the Use and Benefit of
MARTIN STEEL CONSTRUCTORS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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28pp

QUESTION PRESENTED FOR REVIEW

In a case arising out of the Miller Act[1] involving a contract entered into and performed between Hawaiian parties, was it proper for the courts below to deny appellant the benefit of local law by refusing to interpret the contract under the law of the State of Hawaii?

---

[1]40 U.S.C. Section 270(a-d).

PARTIES

Defendant/Petitioner Harvis Construction, Inc. ("Harvis") appealed from the Amended Judgment in Favor of Use plaintiff/appellee Martin Steel Constructors, Inc., ("Martin Steel") filed June 10, 1983, and issued by the United States District Court for the District of Hawaii (CR 74). Said Judgment is based on said District Court's Order Granting Summary Judgment dated May 21, 1982 (CR 55) and Judgment Thereon (CR 56).

This action was brought under the Miller Act, 40 USCA §§ 270a-270d. The case involves the construction of an electric shop addition to a building located at the Pearl Harbor Naval Shipyard at Honolulu, Hawaii, for the United States Navy. Harvis was the general contractor on the project. Harvis entered into a subcontract with defendant Avanti Constructors, Inc. ("Avanti") whereby Avanti agreed to perform the steel work. Avanti, in turn, contracted with Martin Steel to help Avanti fulfill its legal obligations to Harvis by providing and furnishing the steel related materials for Avanti's steel subcontract.

The contract between Avanti and Martin Steel is an Avanti purchase order dated May 17, 1977. A copy of the purchase order is "Exhibit A" to Martin Steel's Motion for Summary Judgment (CR 48).

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VS.

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MARTIN STEEL CONSTRUCTORS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is printed in Appendix A ((9 Cir. 1984) ..... F.2d .....). The Order of the district court granting summary judgment is printed in Appendix D (p. A-13).

JURISDICTION

The basis for subject matter jurisdiction of this Miller Act case in the district court is 40 U.S.C. Section 270(a-d). The opinion of the Court of Appeals for the Ninth Circuit was entered on December 28, 1984. A rehearing was sought and denied on January 31, 1985.

STATEMENT OF THE CASE

The present action was brought by Martin Steel against Avanti for breach of contract, and against Harvis and its sureties under the Miller Act, 40 USCA §§ 270a-270d, to recover monies allegedly due for supplying the steel materials called for on the project.

No appearance was entered by Avanti after service of the Complaint, and its default was taken by use plaintiffs. Avanti filed bankruptcy on May 13, 1982.

On or about June 18, 1979, Harvis and its sureties, defendants Seaboard Surety Company and The Home Insurance Company, answered the Complaint, putting in issue the factual allegations that Martin Steel now claims are "undisputed", including the allegation that Martin Steel delivered the materials as called for pursuant to the proper plans and specifications. Harvis also counterclaimed against Martin Steel. By the counterclaim, Harvis sought damages caused as a result of extraordinary delay by Martin Steel and its supplier, Miscron, in the delivery of essential structural steel to Avanti, misfabrication of crane support steel and omission of work to be performed under the contract specifications.

As a result of Martin Steel's defective performance, the United States Navy delayed acceptance of the work. Harvis had to correct deficiencies and performed work which Martin Steel failed to do. Harvis was prevented from the timely completion of its prime contract. The damages to Harvis included its direct cost resulting from the overall delay; its exposure to liability for liquidated damages under the prime contract and its expenses and liability incurred in correcting and completing the work which Martin Steel was required to perform before entitlement to the payment sought here. These damages to Harvis are stated in the Affidavit of Clark B. Morgan, Jr., filed with Harvis' Memo-

randum in Opposition to Motion for Summary Judgment, and supported by documents attached thereto.

On April 16, 1982, Respondent filed its Motion for Summary Judgment. In its Memorandum in Support for Motion, plaintiff argued that all it had to show in order to obtain summary judgment was that it supplied materials for the project and that it had not been fully paid.

In its Memorandum in Opposition to Motion for Summary Judgment, Harvis asserted that summary judgment could not be granted because there were disputed material issues of fact. These issues were 1) whether or not Martin Steel performed its contract with Avanti by providing goods which conformed to the project plans and specifications, and 2) the nature and extent of the set-off (not counterclaim) damages incurred by Harvis as a result of Martin Steel's failure to provide conforming goods. Harvis argued that Martin Steel was required to prove performance as a matter of law by undisputed evidence that the goods supplied conformed to the project plans and specifications for steel established in Harvis' contract with the United States Navy. These project specifications are expressly incorporated as requirements of Avanti's contract with Martin Steel. The Affidavit of Clark B. Morgan and the correspondence attached thereto show a history of complaints that Martin Steel delayed its performance and supplied defective goods which had to be corrected at Harvis' expense.

The District Court granted the Motion for Summary Judgment, ruling that since Harvis was not in privity of contract, that it could assent no defense to respondent's claim. The Court of Appeals approved this reasoning relying on a Louisiana case and applying Louisiana law.

REASONS FOR GRANTING CERTIORARI

This case involves Miller Act claims which are frequent and widespread and significant both in amount and in the

need for uniform treatment by the Circuits. The Ninth Circuit, by affirming the summary judgment of the district Court and by following the district court's reasoning, has misapplied the law which should be applicable in *all* Circuits of the United States: that the law of the state wherein the contract is entered and to be performed should govern the rights and duties of the parties. The Ninth Circuit Court of Appeals has refused to allow Harvis a defense to the merits of the Miller Act claim because it was not in privity of contract with the respondent. The law of the State of Hawaii *clearly* does not require privity of contract.

THE NINTH COURT OF APPEALS MISTAKENLY APPLIED THE LAW OF LOUISIANA TO DENY HARVIS' CLAIM FOR RIGHT OF SET-OFF

Harvis contended that the facts and the record showing late and defective shipments were a basis of a separate defense of set-off. The Court rejected Harvis' assertion that it was entitled to a set-off based upon the case of *United States ex rel. A & W Concrete Building Materials v. A. P. Johnson Contractor, Inc.*, 225 F.Supp. 727, 729 (E.D. La. 1964). This was a Louisiana decision wherein the Court stated, applying Louisiana law, at Page 729:

> "First, set-off or compensation takes place only between two debts which are equally liquidated and demandable. The law of Louisiana is explicit in this regard.[1] The debt asserted by A & W is fixed and certain and therefore liquidated.[2] A certain amount of cement, at a certain price, was delivered and poured. The invoices, signed dray tickets and affidavits submitted prove the existence of a debt to A & W, and the evidence is uncontradicted. On the other hand, the alleged claim of Harris-Smith does not meet this test; it is contested and not capable of exact ascertainment, based as it is on damages claimed because of an alleged

breach of contract occasioned by delays, insufficiency of deliveries and other allegations not capable of proof promptly and summarily.[3]

[1]LSA-C.C. art. 2209.

[2]Olinde Hardware & Supply Co. v. Ramsey, La. App. 1 Cir., 98 So.2d 835 (1957).

[3]Saunier v. Saunier, 217 La. 607, 47 So. 2d 19 (1950); Spencer v. West, La.App. 2 Cir., 126 So.2d 423 (1960); City of Shreveport v. Curcio, La.App. 2 Cir., 157 So. 317 (1934)."

The District Court's conclusion that the Miller Act did not envision a defense of set-off was, therefore, completely superfluous to the law of the case since, under the applicable law of Louisiana, a defense of set-off would not be applicable in any event.

It has long been established in Miller Act cases that state law is to be applied. In the case of *United States ex rel. Arlmont Air Condition Corp. v. Premier Contractors, Inc.*, 283 F.Supp. 343 (N.D. Me. 1968) cited by the Court on Page 9 of its Opinion, it is clearly stated that local law, in that case the law of Maine, was applicable to Miller Act cases. At Page 348 the Court stated:

"According to the law of Maine, which is here applicable,[7] a defaulting contractor whose breach is not wilful and who has in good faith supplied a net benefit to another party is entitled to recover in *quantum meruit* the net benefit conferred."

"[7]In actions brought under the Miller Act, state law is applied to determine the substantive rights of the parties under their contracts. United States for Use and Benefit of Shields, Inc. v. Citizens and Southern National Bank of Atlanta, 367 F.2d 473, 477 (4th Cir. 1966); Central Steel Erection Co. v. Will, 304 F.2d 548, 554 (9th Cir. 1952); United States for Use and Benefit of Greenville Equipment Co. v. United States Casualty Co., 218 F. Supp. 653, 656-657 (D.Del. 1962); cf. American Auto Ins. Co. v. United States, 289 F.2d 406, 411-412 (1st Cir. 1959). In the present case, where the contract was to be performed in Maine and

where suit is brought in the District of Maine, the law of Maine determines the sufficiency of performance as well as questions of damages and remedy. E. g. Katz v. Gordon Johnson Company, 160 F. Supp. 126 (D.Me. 1958)."

Under the law of the State of Hawaii, the defense of set-off in circumstances of this case is clearly recognized. In Hawaii, under the facts of this case, the defense would be termed "recoupment", rather than "set-off". *Pacific Concrete F.C.U. v. Kauanoe*, 62 Haw. 334, 338; 614 P.2d 936:

DOCTRINE OF RECOUPMENT

The term "recoupment" developed under principles of common law and described a claim that defendant could assert against plaintiff only if it arose from the same transaction as plaintiff's claim. It is in the nature of a defense and can only be asserted to reduced, diminish or defeat the plaintiff's claims. A unique characteristic of common law recoupment is that it permits the defendant to raise a claim without regard to the statute of limitations which would apply if the defendant brought an affirmative action on the same claim. WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil Section 1401 (1971).

Hawaii has recognized "recoupment" in a number of cases distinguishing it from "set-off" which arises out of a separate transaction, unrelated to plaintiff's claim. Hong Hoon v. Lum Wai, 26 Haw. 546 (1922); Oahu Railway Co. v. Waialua A. Co., 16 Haw. 520 (1905); Erickson v. Volcano Stables and Transportation Co., 13 Haw. 428 (1901)."

The Court, mistakenly, concludes that in order to assert a set-off defense, that Harvis must be in privity of contract with Martin. The Court states throughout the Opinion that there was admittedly a defective and late performance of the contract, but asserts there is no right of a set-off

defense by reason of these damages because of lack of privity as between Martin and Harvis.

The contract in question is governed by the Uniform Commercial Code, Hawaii Revised Statutes, Section 490. The privity of requirement therein is governed by Haw. Rev. Statute 490: 2-318. The State of Hawaii chose to adopt the most liberal version in 1965. Section 490:2-318, Third Party Beneficiaries of Warranties Express or Implied, provides as follows:

> "A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends."

This is Alternative C of the Uniform Commercial Code. It is the most liberal version and extends the scope of the warranty to any person who may reasonably be expected to use, etc., as distinguished from family or household of the buyer. The version C also extends the scope of the warranty to any type of injury as distinguished from personal injury. See 1966 amendments: 1A U.L.A. (Uniform Laws Annotated Master Edition, Section 2-318). See also 3 Anderson 3d, Sec. 2-318:2.

The law of the State of Hawaii clearly extends the benefits of the Uniform Commercial Code to a party beyond the scope of the immediate seller and purchaser. *Ontani v. Straub Clinic and Hospital,* 659 P.2d 734 (Haw. 1983), at Page 743:

> "Ontai's third cause of action against G.E. is based on the theory of implied warranty. Although Ontai was not in privity with G.E. in the sale of the X-ray table and footrest, the warranty to Straub from G.E. extends to Ontai by statute, as a third party beneficiary; see HRS Section 490:2-318."

CONCLUSION

The Court has found that Martin made non-confirming deliveries, yet deprived Harvis of its day in court. It is ironic that even counsel for Martin in opposing the Harvis Third Party Complaint (hearing before Judge Curtis, Nov. 6, 1981), transcript page 9, stated:

Mr. MacDonald (for Martin Steel):

> "With regard to the merits of the argument, I think we first have to distinguish between defenses available to the prime contractor and the bonding companies, and a separate claim for damages. I think we've confused here the defense of set-off with an affirmative claim; and, in this case, the contract is rather stark. I don't know what the exact—I forget what the exact prayer of Martin Steel is in this case, but it is substantially less than the claims counterclaimed by the general contractor.
>
> *Certainly, we would have no quarrel with the argument that the general contractor is entitled to plead set-off as an affirmative defense . . .*" (emphasis added.)

Harvis was deprived of the very defense that even respondent conceded they had.

It is most respectfully submitted that this Court should grant Certiorari.

Dated: March 22, 1985

Respectfully submitted,

HINES & THOMAS
ROBERT L. HINES
Attorneys for Petitioner

(Appendices follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 83-2129
D.C. No. C-79-0159

United States of America, for the use and benefit of
Martin Steel Constructors, Inc.,
Plaintiff-Appellees,

vs.

Avanti Constructors, Inc.,
Defendant,
and
Harvis Construction, Inc., Seaboard Surety Company,
and The Home Insurance Company,
Defendants-Appellants.

[Filed Dec. 28, 1984]

Appeal from the United States District Court
for the District of Hawaii
The Honorable Helen J. Frye, District Judge, Presiding
Argued and submitted November 7, 1984

Opinion

Before: Hug, Tang and Schroeder, Circuit Judges.
Tang, Circuit Judge:

I. Overview

Defendant Harvis Construction, Inc. (Harvis), appeals the district court's grant of summary judgment in favor of use plaintiff Martin Steel Construction, Inc. (Martin). Martin brought suit under the Miller Act, 40 U.S.C. § 270(a-d),

for unpaid amounts due on its contract to supply steel materials to subcontractor Avanti Construction, Inc. (Avanti). Harvis maintains that summary judgment was improper because Martin failed to prove its prima facie case, and also because the district court erred in not allowing Harvis a set-off defense. These assertions are based on evidence showing that Martin made late and non-conforming deliveries to Avanti. We reject Harvis' assertions of error and affirm the summary judgment.

II. Facts

Harvis was the general contractor for the construction of an electric shop addition to a building at the Pearl Harbor Naval Shipyard, Honolulu, Hawaii. In accordance with 40 U.S.C. § 270a, Harvis executed a bond, accepted by the United States, to protect material and labor suppliers working on the project.

Harvis then entered into a subcontract with Avanti, wherein Avanti agreed to perform the steel work at the site. Avanti entered into a contract with Martin for supply of steel-related materials to be used in its subcontract. The contract is a purchase order dated May 17, 1977.

In accordance with the contract, Martin supplied steel materials eventually used in the project. Affidavits and correspondence in the record show that many of the shipments from Martin to Avanti were delayed and/or defective. Avanti encountered financial difficulties, failed to complete its work and failed to pay Martin for all shipments made under the contract. Although some required repair or alteration, all goods delivered by Martin undisputedly were used in the project.

On April 11, 1979, Martin filed suit against Avanti, Harvis, and Harvis' sureties under the Miller Act, 40 U.S.C. § 270a-b, to recover on Harvis' bond the amounts owed by

Avanti to Martin. Harvis answered and counterclaimed against Martin for damages resulting from alleged delays and defective shipments to Avanti, but allegedly damaging Harvis. Avanti never answered, and default judgment was entered against it on July 10, 1979. In May 1982, Avanti filed bankruptcy and was dismissed by Martin from this suit.

In December, 1980, Martin moved for judgment on the pleadings on Harvis' counterclaim. After a hearing, Judge Curtis originally denied the motion, but on April 10, 1981 granted the motion to dismiss the counterclaim. Judge Curtis based the dismissal on the lack of privity between Harvis and Martin, finding it a bar to Harvis' affirmative contract claim. Harvis attempted to appeal this dismissal, but filed prematurely; the dismissal of the counterclaim has subsequently never been appealed. Harvis' attempt to amend its counterclaim was denied after a hearing by a magistrate.

On April 16, 1982, Martin filed the motion for summary judgment in this case. Martin claimed that under the Miller Act it was entitled to monies owed for materials supplied under its contract with Avanti as a matter of law. Judge Frye entered an Order granting the motion on May 21, 1982. Harvis appeals the summary judgment based on its contention that genuine issues of material fact exist, and that Harvis has a set-off defense not precluded by the dismissal of its counterclaim.

III. Discussion

A. Standard of Review.

We review the grant of summary judgment under the same standard as the trial court; after viewing the evidence, de novo, in the light most favorable to Harvis, we must determine whether the trial court correctly found that there was no genuine issue of material fact and that the

Martin was entitled to judgment as a matter of law. Ward By & Through Ward v. United States Dept. of Labor, 726 F.2d 516, 517 (9th Cir. 1984).

B. Prima Facie Case

The Miller Act, 40 U.S.C. § 270a(a)(2), requires a general contractor on a federal project to post a bond to protect those who supply labor or materials for the project. The act allows a subcontractor's materials supplier to bring suit on the bond for any unpaid amounts owing for labor or materials, even if no contractual relationship exists between the general contractor and the supplier. 40 U.S.C. § 270b(a). The purpose of the Act is to protect persons supplying materials and labor for federal projects, and it is to be construed liberally in their favor to effectuate this purpose. F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc., 417 U.S. 116, 124 (1974).

The district court entered summary judgment in Martin's favor, holding that Martin, as a materials supplier, was entitled to collect unpaid amounts under its contract with Avanti, the subcontractor, as a matter of law. In order to prevail under section 270b of the Miller Act, a material supplier need only prove four elements:

> (1) the materials were supplied in prosecution of the work provided for in the contract;
>
> (2) he has not been paid.
>
> (3) he had a good faith belief that the materials were intended for the specified work; and
>
> (4) the jurisdictional requisites were met.

United States ex rel. Carlson v. Continental Casualty Co., 414 F. 2d 431, 433 (5th Cir. 1969) (affirming summary judgment for material supplier).

The record in this case shows that Martin supplied materials for use at the Navy project, and that Avanti failed to pay Martin for all the goods delivered. Additionally,

Martin's good faith belief as to the use of goods is not at issue, since it is undisputed that all goods supplied were eventually used in the project. Finally, Martin undisputedly met the jurisdictional requirements of timely notice and filing under § 270b(a). Under the Continental Casualty standard, Martin has made its required showing, and the district court correctly awarded summary judgment in its favor.

Harvis maintains that in addition to the elements of proof enumerated in Continental Casualty, materialmen claiming under the Miller Act must affirmatively prove compliance with the terms of the contract with the subcontractor. See, e.g., Jefferson Construction Co. v. United States ex rel. Bacon, 283 P.2d 265 (1st Cir. 1960), *cert. denied,* 365 U.S. 835 (1961) (failure to plead or prove compliance with underlying contract and fulfillment of conditions precedent therein precluded summary judgment); United States ex rel. Foster Wheeler Corp. v. American Surety of N.Y., 142 F.2d 726, 728 (2d Cir. 1944) (subcontractor and general contractor's stipulation as to balance owing under contract did not relieve subcontractor of burden to prove it performed its contract); United States ex rel. Purity Paint Products Corp. v. Aetna Casualty & Surety Co., 56 F.Supp. 431, 434 (D.Conn. 1944) (supplier of paint to subcontractor must prove paint furnished was in accordance with contract terms requiring paint to conform to specifications of principal contract where subcontractor rejected shipments). Relying on these authorities, Harvis maintains that summary judgment was improper because the record contains evidence that Martin made late and nonconforming deliveries.

Harvis' reliance on this line of authority is misplaced, as these cases requiring proof of compliance with contract terms beyond delivery and acceptance of goods are factually distinguishable from our case. Here, we are considering a

simple contract for sale of goods, where none of the deliveries were rejected; although the record contains evidence of late and nonconforming deliveries, Avanti accepted the materials and they were undisputedly used in the project.

In contrast, the cases relied on by Harvis involve factual situations wherein proof of compliance with specific contract terms beyond delivery and acceptance was necessary to resolve legal issues in the case. For example, Purity Paint involved a situation where paint shipments had been rejected upon delivery as not in conformity with project specifications. 56 F. Supp. at 434. Thus, the material supplier's compliance with specific contract provisions regarding paint quality was clearly necessary to resolve the case. Similarly, in Foster Wheeler, the dispute centered around the cause of a failure in brick walls where the materialman had supplied the bricks a year earlier. 142 F.2d at 727. Thus, the conformity of the bricks to specifications was clearly relevant.

Jefferson Construction also contains broad language suggesting that under the Miller Act a plaintiff must affirmatively prove its compliance with the underlying contract. 283 F.2d at 267. But again, Jefferson Construction involves facts not present in our case; the contract involved explicit conditions precedent to payment, beyond delivery of goods:

> the "contract price is subject to the final measured quantities * * * . . . Ten percent (10%) of the total amount of this contract shall be retained by the Contractor until final acceptance and approval by the General Contractor and Architect and Owner. * * * Before final payment * * * the Subcontractor shall furnish * * * receipted invoices * * * that all labor and bills of all nature for this project have been paid in full * * *."

Id. The court explicity relied on these conditions and stated that requiring proof of the contract in the absence of such conditions might be "superfluous". Id.

In the present case, the contract consisted of a simple purchase order, specifying the goods ordered and providing for a lump sum payment. It did not contain any conditions similar to those in the contract in Jefferson Construction. On our facts, Martin undisputedly delivered the goods under the contract, and the four requirements of Continental Casualty are met. On the facts of this case, no other proof is needed to succeed on a Miller Act claim. Finding no genuine issue of material fact as to any of the four required elements, we hold that Martin was entitled to judgment as a mater of law, and affirm the summary judgment.

C. Set-Off Defense

Harvis further relies on the facts in the record showing late and defective shipments as the basis for its second asserted error, that it is entitled to a separate defense of set-off. Although Avanti's trustee in bankruptcy may have a contract action against Martin for alleged breach of their contract, the district court, Judge Curtis, ruled that Harvis does not have such a claim against Martin because there is no privity of contract between Harvis and Martin. This was determined in the dismissal of Harvis' counterclaim, which is not on appeal in this action.

We reject Harvis' assertion that it is entitled to assert a set-off defense, notwithstanding Judge Curtis' ruling. Cases allowing a defense of set-off are limited to those in which the plaintiff is a subcontractor or materialman of the general contractor and thus is in direct contractual relations with the counterclaimant. See, e.g., United States ex rel. Johnson v. Morley, 98 F.2d 781 (2d Cir. 1938) (allowing counterclaims for set-off against plaintiffs in privity with

general contractor, but denying set-off against party not in privity); United States ex rel. Kashulines v. Thermo Contracting Corp., 437 F. Supp. 195 (D.N.J. 1976); United States ex rel. Arlmont Air Condition Corp. v. Premier Contractors, Inc., 283 F. Supp. 343, 348-49 (N.D. Maine 1968).

In United States ex rel. A. & W. Concrete and Building Materials, Inc. v. A. P. Johnson Contractor, Inc., 225 F. Supp. 727, 729 (E.D. La. 1964), the court explicitly held that a claim to set-off arising out of a contract to which the general contractor was not a party is personal to the contracting parties. The defense of set-off was not allowed; the court found that the Miller Act did not envision such a defense. Id. We find that a set-off defense is not available in a Miller Act claim in the absence of privity. The Act was created for the protection of those in Martin's position, and allowing a set-off defense by a general contractor not in privity with Martin would unduly burden the enforcement of the rights created by the Act.

Furthermore, although Harvis may incur losses as a consequence of Martin's alleged defective deliveries, Harvis' complaint, if any, would seem to be against its subcontractor Avanti. Indeed, Harvis was in the best position to protect itself against Avanti's potential bankruptcy.

> [T]he prime contractors could easily have secured themselves against loss by requiring the subcontractor to give security by bond or otherwise for the payment of those who contracted directly with the subcontractor. After all, the prime contractor selects his own subcontractors and it seems not unjustly harsh that he should be holden for their laxities.

Glassell-Taylor Co. v. Magnolia Petroleum Co., 153 F.2d 527, 530-31 (5th Cir. 1946).

IV. Conclusion

Harvis has failed to raise a genuine issue of material fact as to the required showing for a successful Miller Act claim. Absent privity of contract, a separate defense of set-off is not available. Accordingly, the summary judgment in Martin's favor is AFFIRMED.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 83-2129

D.C. No. C-79-0159

United States of America, for the use and benefit of
Martin Steel Constructors, Inc.,
Plaintiff-Appellees,

vs.

Avanti Constructors, Inc.,
Defendant,
and
Harvis Construction, Inc., Seaboard Surety Company,
and The Home Insurance Company,
[Filed Jan. 31, 1985]

Before: Hug, Tang and Schroeder, Circuit Judges.

Order

The court has considered the Petition for Rehearing. The Petition for Rehearing is denied.

Appendix C

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In the United States District Court
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Civil No. 79-0159

United States of America, for the use and benefit of
Martin Steel Constructors, Inc.,
Plaintiff,

vs.

Avanti Constructors, Inc., Harvis Construction, Inc.,
Seaboard Surety Company, and The Home
Insurance Company,
Defendants.

[Filed June 4, 1982]

Judgment

This Matter having come on for hearing before the Honorable Helen J. Frye, District Judge, on May 21, 1982, on Use-Plaintiff Martin Steel Constructors, Inc.'s Motion for Summary Judgment, and the Court having granted said motion;

And this Court being otherwise fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that judgment be entered in favor of Use-Plaintiff Martin Steel Constructors, Inc. and against Defendants Harvis Construction, Inc., Seaboard Surety Company, and The Home Insurance Company in the following amounts:

(a) Principal Amount of Complaint		$75,840.60
(b) Costs		65.00
(c) Interest:	at 6% from 2/8/79 to 6/9/79	1,520.19
	at 8% from 6/9/79 to 4/16/81	5,167.79
	at 10% from 4/16/81 to 5/21/82	8,329.87
	Total	$90,918.45

plus interest at the rate prescribed for judgments by the laws of the State of Hawaii from May 21, 1982 until this Judgment is satisfied.

Dated: June 1, 1982

Helen J. Frye
Judge of the Above-Entitled Court

Appendix D

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In the United States District Court
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Civil No. 79-0159

United States of America, for the use and benefit of
Martin Steel Constructors, Inc.,
Plaintiff,

vs.

Avanti Constructors, Inc., Harvis Construction, Inc.,
Seaboard Surety Company, and The Home
Insurance Company,
Defendants.

Order Granting Motion for Summary Judgment

This matter having come on for hearing before the Honorable Helen J. Frye, District Judge, on Use-Plaintiff Martin Steel's Motion for Summary Judgment on May 21, 1982, at 10:00 a.m.;

And the Court being fully advised in the premises;

It is hereby ordered that Use-Plaintiff Martin Steel Constructors, Inc.'s Motion for Summary Judgment be granted.

Dated:

_____

Judge of the Above-Entitled Court